Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(i)-15–04 OF 2014(C)
ARIFIN ZAKARIA CHIEF JUSTICE, AHMAD MAAROP, RAMLY ALI, ZAHARAH IBRAHIM FCJJ AND AZIAH ALI JCA
2 FEBRUARY 2016

Civil Procedure — Striking out — Statement of claim — Respondents sought to impeach and set aside judgment obtained by appellant on grounds of fraud or new evidence — Whether respondents' statement of claim sufficiently pleaded all relevant particulars for action to impeach or set aside earlier judgment on grounds of fraud or new evidence not available in earlier trial — Whether present case 'obviously unsustainable' case to be struck out summarily — Res judicata — Whether doctrine of res judicata applied to bar respondents from challenging earlier judgment of court — Whether claim scandalous, frivolous or vexatious, or abuse of process of court

The second respondent had granted the appellant approval to extract timber from a 10,000 acres forest situated in Pahang ('the concession area'). However, the appellant complained that the second respondent had prevented it from carrying out its timber extraction from the entire concession area and had also failed to prevent the extraction of timber by third parties trespassing onto the concession area. The appellant claimed that as a result of the second respondent's breaches, it had suffered losses amounting to a sum of RM36,339,030. The appellant thus commenced a suit against the respondents for the losses it had suffered. During the trial the appellant tendered as evidence a plan of the concession area ('the Blue Plan'), which the appellant's witness claimed had been duly approved by the Pahang State Exco. In their defence the respondents claimed that, based on the records of the State Forestry Department, no approval had been granted to the appellant to extract timber from the area delineated in the Blue Plan. The trial judge ruled in favour of the appellant and entered judgment against the respondents. Consequently, the respondents were ordered to pay the appellant a sum of RM37,127,471.60 with interest. The respondents' appeal to the Court of Appeal was dismissed. The respondents' subsequent application for leave to appeal to the Federal Court was also dismissed. Thereafter, the respondents initiated a fresh suit against the appellant to impeach and set aside the judgment obtained by the appellant against the respondents on the grounds of fraud and/or perjury committed by the appellant's witness during that earlier trial. In its defence to this claim the appellant argued that the fraud which s 44 of the Evidence Act 1950 ('the Act') referred to was actual fraud and not constructive fraud ie fraud

that had prevented the respondents from placing their case before the court. The appellant also argued that in order to bring the action within the provisions of s 44 of the Act, the respondents had to show that the alleged fraud was in the nature of 'extrinsic fraud' as opposed to 'intrinsic fraud'. Subsequently, the appellant filed an application to strike out paras 22–29 of the respondents' statement of claim under O 18 r 19 of the Rules of Court 2012 ('the ROC') by relying on the principle of res judicata as found in s 40 of the Act. The appellant also contended that the exception to res judicata as found in s 44 of the Act, was not applicable in the present case. The trial judge found that based on the reliefs prayed for by the respondents the issue of res judicata did not arise and that the impugned judgment could be impeached or set aside. Thus the High Court dismissed the appellant's application to strike out paras 22–29 of the SOC. On appeal, the decision of the High Court was affirmed by the Court of Appeal. The appellant then applied for and obtained the leave of the Federal Court to proceed with the present appeal. In this appeal the appellant again submitted that the doctrine of res judicata applied to bar the respondents from challenging the earlier judgment of the court and that consequently the respondents' claim should be struck out. The appellant also submitted that in an action to impeach a previous judgment of a court, the respondents needed to pass through a much higher standard, which they had failed to do and that this in turn made the respondents' statement of claim frivolous, vexatious and an abuse of the process. The respondents, on the other hand submitted that this was not an appropriate case for paras 22–29 of the SOC to be struck out under O 18 r 19 of the ROC as this was not an 'obviously unsustainable' case to be struck out summarily.

Held, dismissing the appeal with costs:

(1) It is trite that the impeachment action should be by way a fresh action and not in the same action where the impugned earlier judgment was made. The respondents' claim in the present case was by way of a fresh action based on fresh evidence which could not have been obtained at the earlier trial (see paras 30–32).

(2) The case authorities referred to by the appellant to support its contention that the fraud which s 44 of the Act referred to was actual fraud and not constructive fraud, were of no help to the appellant's case. In all those cases, the decisions of the respective courts were made after full trial of the actions to set aside earlier judgments, and not summarily by striking out process. The applicants in those cases were given their chance to prove their claims of fraud obtained in the earlier judgments by way of trial. However, the present case had not reached that stage yet. The action was still at the early stage where the appellant applied to strike out the respondents' statement of claim under O 18 r 19 of the ROC. In any case, the fraud referred to in s 44 of the Act had to be actual positive fraud, ie a meditated and intentional contrivance to keep the parties and the court

in ignorance of the decree by the contrivance. Thus the earlier judgment could not be impeached or set aside on a mere general allegation of fraud and it had to be shown with sufficient details how, when, where and in what way the alleged fraud was committed. Further, the question as to whether the fraud referred to in s 44 of the Act spoke about intrinsic or extrinsic fraud was an issue of law that required lengthy argument and mature consideration at trial. It was no part of the court's function at this stage of the litigation to decide difficult questions of law which called for detailed argument and mature considerations (see paras 37–44).

(3) The respondents in the present case relied on the issue of new evidence in the form of a file on the actual approved plan by the Pahang State Exco relating to the areas in dispute, which had been seized by the Anti-Corruption Agency for their investigation and thus was not available at the time the respondents were preparing the case for trial. At this stage of the proceedings, it was clear that the respondents' statements of claim, particularly paras 22–29 had complied with the basic requirements or elements, on the issue of new evidence as listed above. However, whether the said evidence could or could not be obtained with reasonable diligence, whether it would have an important influence on the result of the trial, and whether it was presumably to be believed, were purely questions of facts which could only be determined at full trial where witnesses could be called to testify but not by way of affidavits evidence at the stage of summary proceedings of striking out under O 18 r 19 of the ROC as applied for by the appellant. In the present case there was a serious conflict on material facts particularly relating to issues on the existence of fraud (be it extrinsic or intrinsic), and whether the fresh evidence could not have been obtained with reasonable diligence to be adduced during the previous trial. This conflict could only be resolved by subjecting the deponents of the various affidavits to cross-examination or by calling other witnesses whose evidence could only be evaluated by the court after seeing and hearing them (see paras 46–48 & 56).

(4) It is settled law that since the doctrine of res judicata was designed to achieve justice, a court could decline to apply it, if its application would lead to an unjust result. Thus, the Court of Appeal had rightly decided that the earlier judgment in question did not operate to bar the respondents from making an application to challenge and to set aside the said earlier judgment (see paras 50–55).

(5) In the circumstances, paras 22–29 of the respondents' statement of claim had sufficiently pleaded all the relevant particulars or elements to set for trial an action to impeach or set aside the earlier judgment on the ground of fraud or on the ground of fresh/new evidence. The action was based on a valid cause of action recognised by law. Therefore, the respondents' action as well as the issue of fraud as pleaded therein, could not be said to

be frivolous, vexatious and an abuse of the process of the court. The High Court judge and the Court of Appeal were right in holding that the respondents' action was not obviously unsustainable and dismissed the appellant's application for striking out (see paras 57–58).

[Bahasa Malaysia summary

Responden kedua telah memberikan perayu kelulusan untuk mengeluarkan kayu balak dari hutan 10,000 ekar yang terletak di Pahang ('kawasan konsesi'). Walau bagaimanapun, perayu mengadu bahawa responden kedua telah menghalangnya menjalankan pengeluaran kayu balak dari keseluruhan kawasan konsesi dan juga telah gagal untuk menghalang pengeluaran kayu balak oleh pihak ketiga yang menceroboh masuk ke dalam kawasan konsesi. Perayu mendakwa bahawa akibat daripada pelanggaran responden kedua, ia telah mengalami kerugian yang berjumlah RM36,339,030. Perayu oleh itu telah memulakan guaman terhadap responden-responden kerana kerugian yang dialaminya. Sepanjang perbicaraan perayu telah menenderkan sebagai keterangan pelan kawasan konsesi itu ('Pelan Biru'), yang mana saksi perayu mendakwa telahpun diluluskan oleh Exco Negeri Pahang. Dalam pembelaan mereka responden-responden mendakwa bahawa, berdasarkan rekod-rekod Jabatan Perhutanan Negeri, tiada kelulusan telah diberikan kepada perayu untuk mengeluarkan kayu balak dari kawasan yang digariskan dalam Pelan Biru itu. Hakim perbicaraan telah memutuskan menyebelahi perayu dan memasuki penghakiman terhadap responden-responden. Berikutan itu, responden-responden telah diperintahkan untuk membayar perayu sejumlah RM37,127,471.60 dengan faedah. Rayuan respnden-responden kepada Mahkamah Rayuan telah ditolak. Permohonan responden-responden selanjutnya untuk kebenaran untuk merayu kepada Mahkamah Persekutuan juga telah ditolak. Selepas itu, responden-responden telah memulakan guaman baru terhadap perayu untuk mencabar dan mengetepikan penghakiman yang diperoleh oleh perayu terhadap responden-responden atas alasan fraud dan/atau sumpah bohong yang dilakukan oleh saksi perayu sepanjang perbicaraan terdahulu tersebut. Dalam pembelaannya terhadap tuntutan ini perayu berhujah bahawa fraud yang dirujuk dalam s 44 Akta Keterangan 1950 ('Akta tersebut') adalah fraud sebenar dan bukan fraud konstruktif iaitu fraud yang melarang responden-responden daripada meletakkan kes mereka di hadapan mahkamah. Perayu juga berhujah bahawa bagi tujuan untuk memulakan tindakan dalam peruntukan s 44 Akta tersebut, responden-responden telah menunjukkan bahawa fraud yang dikatakan bersifat 'extrinsic fraud' berbanding dengan 'intrinsic fraud'. Berikutan itu, perayu telah memfailkan permohonan untuk membatalkan perenggan 22–29 penyataan tuntutan ('PT') responden-responden di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KM') dengan bergantung kepada prinsip-prinsip res judicata seperti didapati dalam s 40 Akta tersebut. Perayu juga telah menegaskan bahawa pengecualian kepada res judicata seperti didapati dalam s 44 Akta tersebut tidak boleh terpakai dalam kes ini. Hakim

perbicaraan mendapati bahawa berdasarkan relief-relief yang dipohon oleh responden-responden isu res judicata tidak timbul dan bahawa penghakiman yang dipersoalkan boleh dicabar atau diketepikan. Oleh itu Mahkamah Tinggi menolak permohonan perayu untuk membatalkan perenggan 22–29 PT. Atas rayuan, keputusan Mahkamah Tinggi telah disahkan oleh Mahkamah Rayuan. Perayu kemudian telah memohon untuk dan memperoleh kebenaran Mahkamah Persekutuan untuk meneruskan dengan rayuan ini. Dalam rayuan ini perayu sekali lagi telah berhujah bahawa doktrin res judicata terpakai untuk menghalang responden-responden daripada mencabar penghakiman terdahulu mahkamah dan bahawa berikutan itu tuntutan responden-responden patut dibatalkan. Perayu juga berhujah bahawa dalam tindakan untuk mencabar penghakiman terdahulu mahkamah, responden-responden perlu melalui piawai yang lebih tinggi, yang mana mereka telah gagal untuk lakukan dan bahawa dengan ini telah membuat penyataan tuntutan responden-responden remeh, menyusahkan dan penyalahgunaan proses. Responden-responden, sebaliknya berhujah bahawa ini bukan kes sesuai untuk perenggan-perenggan PT dibatalkan di bawah A 18 k 19 KM kerana ia bukan kes yang 'obviously unsustainable' untuk dibatalkan terus.

Diputuskan, menolak rayuan dengan kos:

(1) Ia lapuk bahawa tindakan pendakwaan hendaklah melalui tindakan baru dan bukan dalam tindakan sama di mana penghakiman terdahulu yang dicabar telah dibuat. Tuntutan responden-responden dalam kes ini adalah melalui tindakan baru berdasarkan keterangan baru yang tidak dapat diperoleh dalam perbicaraan terdahulu (lihat perenggan 30–32).

(2) Autoriti kes yang dirujuk oleh perayu untuk menyokong hujahnya bahawa fraud yang mana s 44 Akta tersebut dirujuk adalah fraud sebenar dan bukan fraud konstruktif, tidak membantu kes perayu. Dalam semua kes tersebut, keputusan mahkamah berkenaan telah dibuat selepas perbicaraan penuh ke atas tindakan-tindakan untuk mengetepikan penghakiman-penghakiman terdahulu, dan tidak terus melalui proses pembatalan. Pemohon-pemohon dalam kes-kes tersebut mereka telah diberikan peluang untuk membuktikan tuntutan fraud mereka yang diperoleh dalam penghakiman-penghakiman terdahulu melalui perbicaraan. Walau bagaimanapun, kes ini masih tidak mencapai tahap tersebut. Tindakan itu masih diperingkat awal di mana perayu telah memohon untuk membatalkan penyataan tuntutan responden-responden di bawah A 18 k 19 KM. Dalam apa-apa kes, fraud yang dirujuk dalam s 44 Akta tersebut hendaklah fraud positif sebenar iaitu usaha yang disengajakan dan difikirkan untuk menyebabkan pihak-pihak dan mahkamah tidak mengetahui tentang dekri oleh usaha itu. Oleh itu penghakiman terdahulu tidak boleh dicabar atau diketepikan berdasarkan pengataan umum berhubung fraud dan ia perlu

ditunjukkan dengan butiran mencukupi tentang bagaimana dan dalam cara apa fraud yang dikatakan itu telah dilakukan. Selanjutnya, persoalan berhubung sama ada fraud yang dirujuk dalam s 44 Akta tersebut menyebut tentang fraud intrinsik atau ekstrinsik adalah isu undang-undang yang memerlukan hujah yang panjang lebar dan pertimbangan matang semasa perbicaraan. Tiada bahagian fungsi mahkamah di peringkat ini berhubung litigasi itu untuk memutuskan persoalan undang-undang sukar yang memerlukan hujah terperinci dan pertimbangan matang (lihat perenggan 37–44).

(3) Responden-responden dalam kes ini bergantung kepada isu-isu keterangan baru dalam bentuk fail tentang rancangan sebenar yang diluluskan oleh Exco Negeri Pahang berkaitan kawasan-kawasan yang dipertikaikan, yang telah disita oleh Agensi Pencegahan Rasuah untuk siasatan mereka dan oleh itu tidak tersedia pada masa responden-responden menyediakan kes untuk perbicaraan. Pada peringkat prosiding ini, ia adalah jelas bahawa penyataan tuntutan responden-responden, terutamanya perenggan 22–29 telah dipatuhi dengan keperluan atau elemen asas, berhubung isu keterangan baru seperti yang disenaraikan di atas. Walau bagaimanapun, sama ada keterangan tersebut boleh atau tidak boleh diperoleh dengan ketekunan munasabah, sama ada ia boleh mempunyai pengaruh penting ke atas keputusan perbicaraan, dan sama ada ia diandaikan untuk dipercayai, adalah persoalan berhubung fakta semata-mata yang hanya boleh ditentukan di perbicaraan penuh di mana saksi-saksi boleh dipanggil untuk memberi keterangan tetapi bukan melalui afidavit-afidavit keterangan di peringkat prosiding terus untuk pembatalan di bawah A 18 k 19 KM sepertimana dipohon oleh perayu. Dalam kes ini terdapat konflik serius berhubung fakta material khususnya berhubung isu tentang kewujudan fraud (sama ada ia ekstrinsik atau intrinsik), dan sama ada keterangan baru tidak boleh diperoleh dengan ketekunan munasabah untuk dikemukakan sepanjang perbicaraan terdahulu. Konflik ini hanya boleh diselesaikan dengan meletakkan deponen-deponen pelbagai afidavit itu kepada pemeriksaan balas atau dengan memanggil saksi lain yang keterangan hanya boleh dinilai oleh mahkamah selepas melihat dan mendengar mereka (lihat perenggan 46–48 & 56).

(4) Ia adalah undang-undang tetap bahawa sejak doktrin res judicata direka untuk menuntut keadilan, mahkamah boleh menolak untuk menerima pakai, jika permohonannya boleh mambawa kepada keputusan yang tidak adil. Oleh itu, Mahkamah Rayuan dengan betul telah memutuskan bahawa penghakiman terdahulu yang dipersoalkan tidak beroperasi untuk menghalang responden-responden daripada membuat permohonan untuk mencabar dan untuk mengetepikan penghakiman terdahulu tersebut (lihat perenggan 50–55).

(5) Dalam keadaan itu, perenggan 22–29 penyataan tuntutan responden-responden telah mempli secukupnya semua prinsip-prinsip atau elemen-elemen relevan untuk menetapkan bagi perbicaraan suatu tindakan untuk mencabar atau mengetepikan penghakiman terdahulu atas alasan fraud atau atas alasan keterangan baru. Tindakan itu adalah berdasarkan kausa tindakan yang sah diiktiraf oleh undang-undang. Oleh demikian, tindakan responden-responden dan juga isu tentang fraud sepertimana dipli di sini, tidak boleh dikatakan sebagai remeh, menyusahkan dan penyalahgunaan proses mahkamah. Hakim Mahkamah Tinggi dan Mahkamah Rayuan adalah betul dalam memutuskan bahawa tindakan responden-responden tidak nyata tidak boleh dikekalkan dan menolak permohonan perayu untuk pembatalan (lihat perenggan 57–58).]

Notes

For cases on statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8945–9006.

Cases referred to

A-G of Duchy of Lancaster v London and North Western Rly Co [1892] 3 Ch 274, CA (refd)
American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)
Birch v Birch [1902] P 130, CA (refd)
Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt [1935] 1 MLJ 31 (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
Cole v Langford [1898] 2 QB 36, QBD (refd)
Duches of Kingston's Case 2 Smith LC (13th Ed) 644 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Hubbuck & Sons v Wilkinson, Heywood and Clark [1899] 1 QB 86, CA (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (folld)
Mahomed Sulliman v Mahomed Golab [1894] ILR 21 Calc 612, HC (refd)
Mcharg v Woods Radio Pty Ltd [1948] VLR 496 (refd)
Muktamala Dasi v Ram Chandra De and others AIR 1927 Cal 84, HC (refd)
Patch v Ward (1867) LR 3 Ch App 203, CA (refd)
Priestman v Thomas [1884] 9 PD 270 (refd)
Satish Chandra v Satish Kantha Roy AIR 1923 PC 73 (refd)
Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 (refd)

Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] 1 MLJ 473, CA (refd)
Wyatt v Palmer [1899] 2 QB 106, CA (refd)

Legislation referred to

Evidence Act 1950 ss 40, 41, 42, 44
Rules of Court 2012 O 18 r 19, O 33 r 3
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Appeal No C-01(IM)-042 of 2010 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Rajoo Moorthy, Lua Ai Siew, Elyazura Md Shaarani and David Yii Hee Kiat with him) (Soo Thien Meng & Nashrah) for the appellant.
Muhammad Shafee Abdullah (Noor Fasha Mustaffa with him) (Shafee & Co); Ahmad Hanir Hambali (Senior Federal Counsel, Attorney General's Chamber) for the respondents.

Ramly Ali FCJ (delivering judgment of the court):

THE APPEAL

[1] The present appeal before us is against the decision of the Court of Appeal dated 18 January 2012 affirming the decision of the Kuantan High Court dated 2 September 2010 in dismissing the appellant's application to strike out paras 22–29 of the respondent's statement of claim dated 22 December 2008.

[2] On 20 March 2014, leave to appeal to the Federal Court was granted on the following two questions:

(a) whether the test in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 applies to an application to strike out an action brought to impeach a judgment based on intrinsic fraud or whether a different threshold should be applied; and

(b) whether intrinsic fraud including perjured evidence is a ground in which a judgment of a court of competent jurisdiction may be impeached by virtue of s 44 of the Evidence Act 1950.

FACTUAL BACKGROUND

[3] Since we are dealing here with the question of striking out pleadings under O 18 r 19 of the Rules of the High Court 1980 (now the Rules of Court 2012 'the ROC'), we do not propose to go into the facts and documents in any

more detail than is necessary. In this regard, we only need to trace the basic factual background of the matter that lead to the filing of the striking out application by the appellant.

[4] The tussle between the parties started when the appellant filed an action against both the respondents on 9 January 2002 at the Kuantan High Court vide Civil Suit No MT (1) 21–9 of 2002 ('2002 Suit'). The said claim relates to a forest concession of 10,000 acres in Kampung Nenasi, Mukim Bebar, Daerah Pekan, Negeri Pahang awarded to United Malay National Organisation ('UMNO') Pahang. The appellant was granted approval by the second respondent to extract timber under the said concession. The appellant claimed that out of the 10,000 acres granted, they only managed to extract timber from an area measuring 7,000 acres, because the second respondent had refused to permit the appellant to do the same from the balance area of 3,000 acres which the appellant claimed to include a portion of virgin forest in which the density of the trees was more intense and hence much more profitable. Instead, the appellant claimed that the second respondent failed or neglected to prevent the extraction of timber by third parties trespassing into the said concession area. As a result of the second respondent's breaches, the appellant claimed to have suffered losses amounted to a sum of RM36,339,030.

[5] During trial of the 2002 Suit the appellant tendered as evidence a plan ('the Blue Plan') of the said area, which the appellant's witness claimed to have been duly approved by the Pahang State Exco on 5 April 2000. The respondents on the other hand claimed that, based on the records of the State Forestry Department, no approval was granted in respect of the area delineated in the said 'Blue Plan'. The respondents also claimed that the State Forestry Department had only approved the concession area as set out in 'the Yellow Plan', which was the one approved by the Pahang State Exco on 7 January 1998. Subsequently, according to the respondents, the same concession area was resurveyed, and remapped into an area known as 'the Red Plan'.

[6] Unfortunately, the appellant had opted not to call the maker or the licensed surveyor who approved and signed on the 'Blue Plan'. Thus the respondents were unable to effectively challenge the validity of the said plan in court.

[7] After ten days of trial of the 2002 Suit, on 25 May 2007 the learned trial judge ruled in favour of the appellant and entered judgment against the respondents whereby the respondents were ordered to pay the appellant a sum of RM37,127,471.60 with interest of 8%pa from 31 December 2000 until full satisfaction.

[8] The Court of Appeal on 13 February 2008 dismissed the respondents' appeal on the ground that the respondents failed to file the records of appeal within the time limited. Hence, the judged of the High Court was affirmed by the Court of Appeal. The respondents' application for leave to appeal to the Federal Court was also dismissed on 17 September 2008.

THE RESPONDENTS' ACTION TO IMPEACH EARLIER JUDGMENT

[9] Subsequently, on 22 December 2008, the respondents initiated a fresh action against the appellant vide the Kuantan High Court Civil Suit No MT(1) 21–11 of 2008 to impeach and set aside the earlier judgment of the trial judge dated 25 May 2007 on the premise that the said judgment was entered into as a result of fraud or perjured evidence by the appellant's witness based on fresh evidence which could not have been obtained and adduced at the earlier trial. The basis of the respondents' action is as clearly stated in paras 22–29 of the statement of claim. These are the very paragraphs which the appellant seeks to strike out under O 18 r 19 of the ROC (the subject matter of the present appeal before us).

[10] For better under appreciation of the issues in the present appeal, the said paras 22–29 of the statement of claim are reproduced in full below:

> 22. Premised on the abovementioned, the Plaintiffs have since discovered that the Defendant has deceived the Kuantan High Court in Civil Suit No MT(2)–21–9–2002 and correspondingly inter-alia the Defendant's 1st witness, the said Lee Sin has committed perjury before the Kuantan High Court.
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> 23. The Plaintiffs contend and will contend that the testimony of the Defendant's 1st witness, the said Lee Sin as mentioned in paragraphs 10, 11 and 12 above, were false and untrue. The specific particulars of the perjury committed by the said Lee Sin are inter-alia as follows:
>
> (a) that the Defendant had wanted to commence works premised on the 2000 plan but the Forestry Department had instructed them to follow the 1998 plan.
>
> (b) that plan No JB-P/P/8044 (P2) with boundary coloured blue as appearing in page 4 of the then Plaintiff's (now Defendant) Bundle of Documents was approved by the State Exco of Pahang on 5 April 2000.
>
> (c) that plan No JB-P/P/8044 (P2) with boundary coloured blue as appearing in page 4 of the then Plaintiff's Bundle of Documents (now Defendant) was approved to UMNO Pahang to replace the plan approved to UMNO in 1998.
>
> (d) that in comparing the 2 (two) plans shown in page 5 of the Plaintiff's (now Defendant) Bundle of Documents, the difference is, one was approved by the Pahang State Exco in 1998 and the other approved by the Pahang State Exco to UMNO Pahang in the year 2000.

(e) that the 1998 plan was amended by the State Exco on 7 April 2000.

(f) that he had knowledge that the new plan was approved by the Pahang State Exco.

(g) that he did not agree that the concession approved to him was in respect of a parcel owned by UMNO in which has been previously worked on.

24. The Defendant's 1st witness the said Lee Sin at the time when the statements were made in Court knew them to be false and untrue and/or made the statements in the absence of any genuine belief that it is true.

25. The Plaintiffs contend and will contend that the documents used at the trial by the Defendant were not what they purported to be and correspondingly the trial was tainted with fraud. As a result of the purported evidence led before the Court, the Plaintiffs contend that the Court was deceived into arriving at its findings pertaining to the concession approved by the Pahang State Exco in the year 2000.

Particulars of deceit

(a) Tendering into evidence plan bearing number JB–P/P/8044(P2) as the plan approved by the Pahang State Exco in the year 2000.

(b) Withholding from the Kuantan High Court the evidence of the surveyor who prepared plan bearing number JB–P/P/8044(P2)

(c) The presentation of false testimony in Court the particulars of which are as set out in paragraph 23 above.

(d) Tendering into evidence a comparison of 2 (two) plans as per page 5 of the Plaintiff's (now Defendant) Bundle of Documents.

(e) The presentation of evidence before the Kuantan High Court detailing a shortage of 3000 acres of purportedly virgin forest wherein the Defendant was not allowed to extract timber.

(f) The presentation of evidence of purported trespass inside the parcel delineated by the said blue plan bearing number JB–P/P/8044(P2).

(g) The presentation of evidence of purported damage suffered inside the parcel delineated by the said blue plan bearing number JB–P/P/8044(P2).

26. As a result of the purported evidence led before the Court, the Plaintiffs contend that the Court was deceived into arriving at its findings pertaining to the concession approved by the Pahang State Exco in the year 2000. The Plaintiffs contend that this deception had spread to and infected the whole body of the judgment dated 25 May 2007.

27. The Plaintiffs further contend that the facts and evidence pertaining to the actual approval for the concession granted by the Pahang State Exco on 5 April 2000 were not before the Kuantan High Court during the trial at Civil Suit No MT(2)–21–9–2002.

Discovery of fresh evidence

28. The Plaintiffs contend that the said enclosure 22 in the Pekan District Land Office file number PTP–7–1015 approved by the Pahang State Exco on 5 April 2000 is new evidence that was not available at the material time of the trial of the abovenamed matter.

29. The documents contained in the Pekan District Land Office file number PTP–7–1015 and the minutes of meeting of the Pahang State Exco on 5 April 2000 are evidence of such a character that it would have formed a determining factor in the result of the trial. The said evidence will conclusively determine the actual approval by the Pahang State Exco on 5 April 2000.

[11] The appellant filed its statement of defence on 20 February 2009, inter alia, denying the said paras 22–29 of the statement of claim and further stated that 'the averment of deceit, of false and untrue statements and/or statements made in the absence of genuine belief that it is true, of fraud and of perjury in the statement of claim are based on the same or substantially the same facts which were canvassed before the Court in Civil Suit No MT (2) 21–9–2002 thereby making this action scandalous, frivolous, vexatious and an abuse of the process of the court' (para 6 of the statement of defence).

[12] The appellant further denied 'the averments of fresh or new evidence in paras 28–29 and states that such evidence was available and could have been obtained during the trial of Civil Suit No MT (2) 21–9–2002 if the plaintiffs had exercised reasonable diligence' (para 8 of the statement of defence).

THE APPELLANT'S APPLICATION TO STRIKE OUT

[13] On 6 Mac 2009, the appellant filed an application in encl 9, to strike out paras 22–29 of the statement of claim under O 18 r 19 of the ROC, substantially on the same grounds as appeared in paras 6 and 8 of its statement of defence.

[14] The said application was heard at the Kuantan High Court. On 2 September 2010, it was dismissed with costs. In dismissing the application, the learned judge made, inter alia, the following findings:

(a) that based on the reliefs prayed for by the respondent the issues of res judicata or functus officio did not arise on the basis of trite law that an application to impeach or set aside a judgment on the ground of fraud can be made by way of a fresh action and the court has the jurisdiction to hear it;

(b) that an allegation of fraud must be proved by way of evidence to be adduced during trial and if satisfactorily proven, the impugned judgment can be impeached or set aside; and

(c) that the relevant documents relating to the fraud, as alleged by the respondents, are considered as new or fresh evidence which were not available to the respondent, at the time of the trial of the 2002 Suit.

[15] On appeal, the said decision of the High Court was unanimously affirmed by the Court of Appeal on 18 January 2012. The present appeal before us is against the said decision of the Court of Appeal.

THE APPELLANT'S SUBMISSIONS

[16] In its application to strike out the relevant paras 22–29 of the statement of claim, the appellant relied on the principle of res judicata as found in s 40 of the Evidence Act 1950 ('the Act') and several cited authorities, including the Supreme Court's decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783. The appellant relied on the principle as ruled by Peh Swee Chin FCJ in that case where His Lordship stated: 'when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgement becomes the truth between such parties or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that it is in the public interest that there should be finality in litigation – interest rei publicae ut sit finis litium'.

[17] The appellant contended that the exception to res judicata as found in s 44 of the Act, was not applicable in the present case as the respondents failed to bring their case within the exception and therefore the doctrine of res judicata applied to bar them from challenging the earlier judgment of the court and consequently the respondents' claim must be struck out.

[18] Relying on the decisions of the Indian Appellate Court in *Mahomed Sulliman v Mahomed Golab* [1894] ILR 21 Calc 612 and our local High Court in *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413, the appellant argued that an action to impeach or to set aside a judgment under s 44 of the Act of the must fulfil the following elements, namely:

(a) the judgment in the earlier action must have been obtained by positive fraud;

(b) the fraud must be extrinsic, that is to say, the defendant has fraudulently prevented the plaintiff from placing his case effectively before the court that heard the previous suit; and

(c) the pleading must contain an explanation as to why the matters alleged could not have been brought forward in the original proceedings; and a pleading that does not set out this element will be struck out as being frivolous and vexatious.

[19] That being the case, the appellant contended that in an action to impeach a previous judgment of a court, the respondents (as the plaintiffs) need to pass through a much higher standard. They must satisfy the court that all the above elements have been pleaded in the statement of claim, failing which the claim for such impeachment will be struck out. In the present case, the appellant contended that none of the above elements has been pleaded in the respondents' statement of claim and the threshold has not been met; and that therefore the said paras 22–29 of the respondents' statement of claim is frivolous, vexatious and an abuse of the process; and therefore should be struck out.

[20] Accordingly, the appellant submitted that both the questions posed in this appeal should be answered in the negative and prayed that the appeal be allowed with costs.

THE RESPONDENTS' SUBMISSIONS

[21] The respondents, on the other hand submitted that this is not an appropriate case for the said paragraphs in the statement of claim to be struck out under O 18 r 19 of the ROC. This is not an 'obviously unsustainable' case to be struck out summarily adopting the test as propounded in *Bandar Builder*.

[22] The respondents further submitted that the court has the jurisdiction to impeach or set aside a previous judgment on ground of fraud by way of a fresh action filed by the respondents. Further, such impeachment of the judgment can also be done where there is fresh evidence which could not have been obtained with reasonable diligence to be adduced at the earlier trial. The learned High Court judge and the Court of Appeal were right in concluding that the principles of res judicata and/or functus officio did not apply in an impeachment or setting aside application on ground of fraud.

[23] The respondents also submitted that they have meticulously pleaded sufficient particulars of fraud, deceit and perjury practised by the appellant during the earlier trial at the Kuantan High Court, and they should be given their day in court to prove their pleaded case.

A OUR JUDGMENT: PRINCIPLE FOR STRIKING OUT

[24] The appeal before us relates to an application to strike out pleading summarily under O 18 r 19 of the ROC on the ground that paras 22–29 of the respondents' statement of claim are scandalous, frivolous or vexatious, or is an abuse of the process of the court.

[25] The principles for striking out pleadings pursuant to O 18 r 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see *Bandar Builder*; *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86; *A-G of Duchy of Lancaster v London and North Western Rly Co* [1892] 3 Ch 274).

[26] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '*obviously unsustainable*' (Emphasis added);

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[27] The Court of Appeal, in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473, had adopted the well settled principle of striking out in the following passage:

> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial, (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court))...

[28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

[29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at p 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

This passage was cited with approval by the Privy Council in a Malaysian case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212.

IMPEACHMENT OF AN EARLIER JUDGMENT

Section 44 of the Evidence Act 1950

[30] The respondents' action in the present case is to impeach or set aside the earlier judgment which was obtained by the appellant against the respondents at the Kuantan High Court on 25 July 2007 on the ground of fraud and/or perjury committed by the appellant's witness during that earlier trial. The claim is by way of a fresh action based on fresh evidence which could not have been obtained at the earlier trial.

[31] The law recognises this type of cause of action. Section 44 of the Act provides that 'Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion'. This provision is an exception to the doctrine of res judicata as provided for under s 40 of the same Act.

By way of a fresh action

[32] The impeachment action must be by way a fresh action, not in the same action where the impugned earlier judgment was made. As early as 1935, Whitley J in the Penang High Court case of *Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt* [1935] 1 MLJ 31, relying on English authorities of *Cole v Langford* [1898] 2 QB 36; *Priestman v Thomas* [1884] 9 PD 270; *Duches of Kingston's* Case 2 Smith LC (13th Ed) 644 and *Patch v Ward* (1867) LR 3 Ch App 203, ruled that, 'The court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing'.

[33] The same principle was adopted by the Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where Chang Min Tat FJ ruled that '... if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment ...'.

[34] The case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 is a good example involving an action to set aside an earlier judgment of a court on ground of fraud, and the court dealt with it in a full trial, but not in a summary striking out process. In that case, the Court of Appeal stressed on the requirement that the allegation of fraud must be established by evidence, and affirmed that whether the test has been met in any given case must depend on the facts and circumstances of the particular case and evidence needs to be adduced during trial.

[35] In another case, *Seng Huat Hang Sdn Bhd* Edgar Joseph Jr J (later FCJ) cited Herring CJ in *Mcharg v Woods Radio Pty Ltd* [1948] VLR 496, held, inter alia, that 'as in all other actions based on fraud, particulars of the fraud must be exactly given and the allegation established by the strict proof that such a charge requires'.

[36] In *Satish Chandra v Satish Kantha Roy* AIR 1923 PC 73 at p 76 (as cited in *Chee Pok Choy*), it was also held that 'Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them – proved by established facts or inferences legitimately drawn from those facts taken together as a whole'. We must add that proof can only be established by way of evidence during trial.

[37] The appellant relied on Indian cases of *Mahomed Golab*; and *Muktamala Dasi v Ram Chandra De and others* AIR 1927 Cal 84; and an

English decision in *Patch v Ward*, to support its contention that the fraud of which s 44 of the Act speaks refers to an actual fraud and not constructive fraud ie fraud practiced by the other side must have prevented the respondents from placing their case before the court.

[38] With respect, we find those authorities cited above are of no help to the appellant's case before us. In all those cases, the decisions of the respective courts were made after full trial of the actions to set aside earlier judgments, and not summarily by striking out process. The applicants in those cases were given their chance to prove their claims of fraud obtained in the earlier judgments by way of trial. In our case, we have not reached that stage yet. The action is still at the early stage where the appellant applied to strike out the respondents' statement of claim under O 18 r 19 of the ROC.

[39] Our view is that the fraud of which s 44 of the Act speaks refers to an actual fraud and not constructive fraud ie fraud practised by the other side must have prevented the respondents from placing their case before the court.

[40] The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the decree by the contrivance (see *Patch v Word*).

[41] The earlier judgment cannot be impeached or set aside on a mere general allegation of fraud. It must be shown with sufficient details how, when, where and in what way the alleged fraud was committed.

'Extrinsic fraud' and 'intrinsic fraud'

[42] The appellant also argued that in order to bring the action within the provisions of s 44 of the Act, the respondents must show that the alleged fraud is in the nature of 'extrinsic fraud' as opposed to 'intrinsic fraud'.

[43] In the *Major Law Lexicon* (4th Ed 2010), 'intrinsic fraud' refers to that fraud which occurs within the framework of actual conduct of trial and pertains to and affects determination of issues presented therein, and it may be accomplished by perjury, or by use of false or forged instruments or by concealment or misrepresentation of evidence; while 'extrinsic fraud' refers to fraud which is collateral to the issues tried in the case wherein the judgment was rendered ie a fraud the effect of which prevents a party from having a trial or from presenting all of his case to the court or has so affected the manner in which the judgment was taken that there has not been a fair submission of the controversy to the court.

[44] In *Cheah Wong Nyan & Cheah Sin Kee*; Whitley J adopted Sir William

de Grey and Lord Walsingham opinion in the *Duchess of Kingston* on the principle that 'fraud is an intrinsic collateral act which vitiates the most solemn proceedings of Court of Justice'. This principle was accepted and adopted by the Court of Appeal in *Chee Pok Choy*. We are of the view that the issue as to whether the fraud is in the form of intrinsic or extrinsic is factual-based and can only be determined at trial. The question as to whether the fraud referred to in s 44 of the Act speaks about 'intrinsic or extrinsic' fraud is an issue of law that requires lengthy argument and mature consideration at trial. It is no part of the court's function at this stage of the litigation to decide difficult question of law which call for detailed argument and mature considerations (see *American Cyanamid Co*).

[45] In *Wyatt v Palmer* [1899] 2 QB 106 the English Court of Appeal dealt with an application to strike out an earlier judgment on the ground of fraud. Lindley MR in that case concluded that 'This is not a case in which the action ought to be summarily stopped ... As a general proposition I think it is dangerous and undesirable to summarily stop an action to set aside a judgment on the ground that it has been obtained by fraud'.

New evidence

[46] The respondents in the present case relied on the issue of new evidence in the form of encl 22 in the Pekan District Land Office File No PTP-7–1015 approved by the Pahang State Exco on 5 April 2000, which they claimed was not available at the earlier trial of the matter at the Kuantan High Court. The respondents claimed that the said file in question concerned the actual approved plan by the Pahang State Exco relating to the areas in dispute which was seized by the Anti-Corruption Agency for their investigation, and this was not available at the time the respondents were preparing the case for trial.

[47] Applying the principle as laid down in *Ladd v Marshall* [1954] 3 All ER 745, the respondents (citing para 561 of *Halsbury's Laws of England* (4th Ed) Vol 26) submitted that:

> an action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the court. It must be present:
>
> (a) that the evidence could not have been obtained with reasonable diligence for use at trial;
>
> (b) that the further evidence is such that, if given would have an important influence on the result of the trial, although it need not be decisive; and
>
> (c) that the evidence is such as is presumably to be believed.

[48] At this stage of the proceedings, we are satisfied that the respondents' statements of claim, particularly paras 22–29 thereof have complied with the basic requirements or elements, on the issue of new evidence as listed above. However, whether the said evidence could or could not be obtained with reasonable diligence, whether it would have an important influence on the result of the trial, and whether it is presumably to be believed, are purely questions of facts which can only be determined at full trial where witnesses can be called to testify and be cross-examined to establish the truth, but not by way of affidavits evidence at the stage of summary proceedings of striking out under O 18 r 19 of the ROC as applied for by the appellant.

[49] The appellant also relied on the case of *Birch v Birch* [1902] P 130 which was earlier quoted by Edgar Joseph Jr J in *Seng Huat Hang* in which His Lordship held that '... there must be a suggestion in the statement of claim, if it (sic) is to escape being struck out as being frivolous and vexatious, of such facts only discovered since the trial, as if proved, would render it reasonably probable that the judgment would be upset, though the facts suggested need not necessarily be such as would have been evidence at the trial'.

Res judicata

[50] The appellant raised the issue of res judicata and submitted that the doctrine applied in present case to bar the respondent from challenging the earlier judgment.

[51] On this issue, the Court of Appeal in *Chee Pok Choy* had the opportunity to deal with the doctrine in an action to impeach or set aside an earlier judgment. In that case, the court elaborated on the provisions of s 44 of the Act and the scope and application of doctrine of res judicata. One of the issues determined in that case was whether the decision of the Supreme Court in an earlier judgment, as a matter of law precludes the appellants from seeking to set aside the judgment.

[52] The Court of Appeal (in that case) concluded that, 'since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to unjust result'.

[53] The Court of Appeal further ruled that '... it would be an affront to justice to permit the respondent to successfully plead res judicata in the second suit as that would tantamount to applying the editorial blue pencil across the mandatory provisions of s 260(2) of the Code'.

[54] For that reason, the Court of Appeal resolved the issue in the appellants' favour to the effect that the earlier judgment in question does not operate to bar the appellants from making an application to challenge and to set aside the said earlier judgment.

[55] Consequently, we hold that the doctrine of res judicata is not applicable in an action to impeach or to set aside an earlier judgment which has been obtained by fraud.

CONCLUSION

[56] In the present case, looking at the pleadings and the lengthy affidavits with various documentary exhibits filed by the parties, we find that there is serious conflict on material facts particularly relating to issues on the existence of fraud (be it extrinsic or intrinsic), and whether the fresh evidence could not have been obtained with reasonable diligence to be adduced during the previous trial. This conflict can only be resolved by subjecting the deponents of the various affidavits to cross-examination and/or calling other witnesses whose evidence can only be evaluated by the court after seeing and hearing them.

[57] We are satisfied that paras 22–29 of the respondents statement of claim have sufficiently pleaded all the relevant particulars or elements to set for trial an action to impeach or set aside the earlier judgment as stated earlier either on the ground of fraud or on the ground of fresh/new evidence. The action is based on a valid cause of action recognised by law. Therefore, the respondents' action as well as the issue of fraud as pleaded therein, cannot be said to be frivolous, vexatious and an abuse of the process of the court.

[58] The 'obviously unsustainable' test as adopted by in *Bandar Builder*, would ensure fair trial and access to the court to litigants. The respondents (the plaintiffs) should be given their day in court to prove their case. The court should not strike out an action purely or for the simple reason that it is 'unsustainable'. The degree of 'unsustainability' must be higher, ie it must be 'obviously unsustainable' before the action can be struck out summarily. The court should not pull its shutter down and close its door to the respondents, by striking out their action summarily. The tests as adopted in *Bandar Builder* must be applicable across the board, including action grounded on fraud, as in the case before us. The learned High Court judge and the Court of Appeal were right in holding that the respondents' action is not obviously unsustainable and dismissed the appellant's application for striking out.

[59] Based on the reasons adumbrated above, we would answer both the questions posed to us as follows:

(a) Question 1 – the answer is in the affirmative ie the test in *Bandar Builder*

applies to an application to strike out an action to impeach a judgment based on intrinsic fraud; and

(b) Question 2 – the answer is also in the affirmative ie intrinsic fraud (including perjured evidence), if established by evidence at trial, is a ground on which a judgment of a court of competent jurisdiction may be impeached by virtue of s 44 of the Act.

[60] In the upshot, we dismiss the appeal with costs and uphold the decisions of the High Court and the Court of Appeal.

Appeal dismissed with costs.

Reported by Kohila Nesan